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Issue Date: 25 May 2005

Case No.: 2004-LHC-2426

OWCP No.: 6-188314

In the Matter of

DANNY R. GREGORY,
Claimant,

v.

M.J. HOGAN AND COMPANY,
Employer.

DECISION AND ORDER

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act (hereinafter the Act), 33 U.S.C. § 901 et. seq. brought by Danny R. Gregory (Claimant) against M.J. Hogan and Company (Employer).

The issues raised by the Parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in Savannah, Georgia on February 3, 2005. All Parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were received into evidence:

1. Joint Exhibit (JX) 1
2. Claimant's Exhibits (CX) 1 – 17
3. Employer's Exhibits (EX) A – Q.

Based on the following stipulations of the Parties at the hearing, the evidence introduced and the arguments presented, I find as follows:

I. Stipulations

1. The Act applies to this claim.

2. The Claimant and Employer were in an employer-employee relationship at the time of the injury.

3. The injury arose out of and in the scope of employment.

4. The date of the injury is April 7, 2002.

5. Employer learned of the injury on April 7, 2002.

6. It is agreed that timely notice of injury was given to Employer.

7. Employer filed a first report of accident on April 16, 2002.

8. It is agreed that Claimant filed a timely notice of claim.

9. The date the notice of controversion was filed is May 18, 2004.

10. Claimant had temporary total disability from April 22, 2002 to August 24, 2003. Claimant was paid for seventy weeks at $966.08 per week for a total of $67,625.60. Claimant received permanent partial disability benefits totaling $102,945.48.

11. Medical benefits under Section 7 of the Act were paid.

12. The last payment of benefits was made on June 30, 2004. Employer filed a notice of suspension of compensation payments on July 14, 2004.

13. Claimant's average weekly wage was $2,029.83.

14. Claimant reached maximum medical improvement on April 14, 2003.

15. Claimant has not returned to his regular employment with Employer since the date of injury.

II. Issues

1. Whether Claimant's injury to his right knee and lower back are related to his work-related injury of April 7, 2002.

2. Whether Claimant is entitled to disability benefits after August 24, 2003 for the injury sustained to his left knee on April 7, 2002.

3. Whether Claimant is entitled to a change of physician under Section 7 of the Act.

III. Findings of Fact

Claimant's Testimony

Claimant is forty-nine years old and has been employed as a longshoreman for twenty-five years. (Tr. 9, 10). Before working for Employer, the longshoreing jobs Claimant would receive were part of a shoring gang. (Tr. 13). This position required a great deal of physical movement, including climbing ladders, jumping, kneeling, bending, squatting, lifting over fifty pounds and running. At the time of Claimant's injury on April 7, 2002, he was working as a line handler. This position also required Claimant to pull, bend, squat, run and climb. (Tr. 15).

Prior to this injury, Claimant injured his lower back while working for a different employer. (Tr. 16). The injury required surgery and missing time from work, however, Claimant affirmed that this injury has completely healed. After this injury healed, Claimant injured his lower back again while twisting. This injury healed without surgery and Claimant did not require any physical restrictions when returning to work. Prior to April, 2002 Claimant also injured his right knee. Claimant affirmed that after receiving some medical treatment he was able to return to work without any restrictions and felt no pain in his knee. (Tr. 20).

Claimant also testified that he injured his left knee prior to April 7, 2002. This injury required arthroscopic surgery. Claimant fully recovered and was able to return to longshore work without any physical restrictions. Claimant affirmed that all of these prior injuries had completely healed prior to his employment with Employer and he never refused to do any part of his job because of problems with any part of his body. (Tr. 22-23).

On April 7, 2002, Claimant was injured tying up a barge and putting the cable on the bow lip. He was knocked off balance and twisted his left knee. The first physician to see Claimant was Dr. Sam Murray, who was recommended by Employer's insurance company. According to Claimant, Dr. Murray instructed Claimant not to return to work. (Tr. 25). Dr. Murray also suggested that Claimant see Dr. Holtzclaw, who recommended a left knee replacement. This procedure was completed in September, 2002.

Before the surgery in September, 2002, Claimant needed the use of cane to walk, as approved by Dr. Murray. (Tr. 27). Consequently the way Claimant walked was adding stress to his right knee, which eventually started hurting as well. Immediately after surgery Claimant was given crutches to assist with walking. He now uses a cane; however, Claimant still has the feeling of his left knee giving away when he applies pressure. He also still has difficulty with his right knee. Furthermore, Claimant testified that he started to develop back pain in the fall of 2003. All of these injuries have worsened in the last couple years.

Claimant testified that based solely on the current condition of his left leg, he is unable to return to his position with Employer or any other longshore jobs because of the physical activity required of those positions. (Tr. 35). Claimant specifically stated that he disagrees with Dr. Holtzclaw's conclusion that Claimant could go back to work as a line handler. Claimant testified that he still has problems balancing and walking because of his knees. He also has problems lifting because of his back. Consequently, Claimant is also still on medication. (Tr. 39).

Claimant testified that he has continued to try to find employment through a rehabilitation counselor. (Tr. 38). He affirmed that he has a car dealer license, which he uses at car auctions. However, this was not for employment purposes, but instead was used as a hobby. (Tr. 40). On cross-examination Claimant stated that he did not have the resources in order to turn this hobby into a profession. (Tr. 66). Claimant also affirmed that he considers himself retired from longshore work. (Tr. 70).

On cross-examination, Claimant summarized his previous injuries. This included a 1978 injury to his right knee, a 1983 injury to his lower back, a 1985 injury to his back, a 1986 injury to his left knee, a 1987 injury to his lower back, a 1991 injury to his back which affected his posture (EX C at 41-42), a 1994 injury to his left knee, treatment by Dr. Holtzclaw in 1995 for pain in both knees, arthroscopic surgery on his right knee in 1996 (EX D), loss of balance because of pain in both knees in 1996, a knee injury in 1997 and foot and left knee injuries in 2001. (Tr. 43-48). Claimant also testified that he has made and settled previous claims with other employers. This included a claim against Del Monte in 1994 relating to his left knee, a claim against Ryan Walsh in 1988 for a back and left leg injury, a claim against Del Monte in 1991 for a back injury, a claim against SSA in 1994 for a shoulder and neck problem, a claim against River Services in 1985, and a 1987 claim against Ryan Walsh for a back problem. (Tr. 48-49).

Claimant confirmed his request for a change in physicians to treat his right knee. Specifically, he has requested seeing Dr. Watson on a full time basis, rather than Dr. Holtzclaw. (Tr. 70). This is because he was not given a choice in physicians. On recross examination, Claimant affirmed that Dr. Watson is his general practitioner and not an orthopedic surgeon. (Tr. 72).

Testimony of Allen Daniels

Mr. Daniels is a private investigator with D. Snoop Private Investigations and has worked for them for eleven years. (Tr. 74). Part of his position requires Mr. Daniels to conduct video surveillance. On May 2, 2003, he was contacted by Mr. Bruce Revell to conduct a surveillance of Claimant.

On May 3rd and 5th, Mr. Daniels videotaped Claimant. Mr. Daniels testified that during the surveillance he did not notice any restriction in Claimant's movement or any discomfort. (Tr. 77). Claimant was seen walking without a limp and no difficulty driving a sports utility vehicle or pumping gasoline. (EX P). He appeared to get in and out of his vehicle without any difficulty. (EX P). Mr. Daniels videotaped Claimant again on

January 16, 2004 and February 28, 2004. (Tr. 78). The only noticeable difference, according to Mr. Daniels, was Claimant then carried a cane.

On March 1, 6, 8, 12 and 15, 2004, as well as May 15 and 17, 2004 Mr. Daniels again videotaped Claimant. During this time period, Claimant appeared to have no trouble driving, getting in and out of his vehicle, bending over or raking leaves. (EX P). Claimant does not use his cane with any consistency. The only days he used the cane with regularity were the days he had appointments with Southcoast Medical Center and Chatham Orthopedics. (EX P). Lastly, Mr. Daniels conducted surveillance in July, 2004. (EX P). Mr. Daniels testified that he did not see any deterioration in Claimant's condition. There were just a few instances where Claimant used more caution when walking than usual. (Tr. 80). In total, Mr. Daniels had Claimant under surveillance for approximately thirteen days.

Testimony of Steven A. Yuhas and Labor Market Surveys

Mr. Yuhas is a rehabilitation consultant and president of the Directions Group. (EX Q). On May 9, 2003, Mr. Yuhas was first contacted to conduct a labor market survey for Claimant. (Tr. 88). The survey was completed on June 26, 2003 and was signed by Lynn McCain, an employee of Mr. Yuhas. (EX O). The results were approved by Dr. Holtzclaw on September 29, 2003. (EX O at 2-8). This survey found suitable employment for Claimant in the Savannah, Georgia labor market. (Tr. 89). The survey identified numerous positions, including unarmed security guard, security monitor, customer service representative and automobile salesperson. (Tr. 89-90). The pay range was identified as anywhere from $7.00 an hour to $40,000 a year. (Tr. 90).

This survey was updated on January 14, 2005. The positions in this survey were also approved by Dr. Holtzclaw. (EX M at 14-15; EX O at 49-55). This survey listed comparable positions to the ones identified in the original survey and the pay ranged from $6.50 an hour to $13.00 an hour, as well as some salesperson positions where the salary ranged from $25,000 to $40,000 annually. (Tr. 92-93). Mr. Yuhas testified that he is not aware of Claimant contacting any of these employers.

On cross-examination, Mr. Yuhas affirmed that the jobs identified in the survey take into account any problems or physical limitations Claimant may have. (Tr. 96). Mr. Yuhas also confirmed that he submitted the potential positions to Dr. Holtzclaw, and not Dr. Alcott. (Tr. 101). Furthermore, Mr. Yuhas testified that to the best of his knowledge the jobs identified in 2005 were generally available in the Savannah area in 2004 and 2003. (Tr. 117).

The labor market survey, as of January 14, 2005, identified potential jobs in the labor market of Savannah, Georgia, which involved sedentary, light and light-medium level work demands. (EX O at 49). Many of these positions were categorized as a security guard, clerk or customer service representative. These type of positions required no previous experience and all the employers were willing to provide any necessary training.

A few of these positions fell under the title automobile salesperson. Potential employers included Fairway Mazda, Lincoln and Mercury, Saturn of Savannah, Savannah Toyota, Vaden Hyundai and Volvo of Savannah. (EX O at 50-51). These were all commissioned based salaries that averaged between $25,000 and $40,000. (Tr. 104). Mr. Yuhas determined Claimant was capable of performing these positions, as Claimant has met the requirements of a high school diploma and a driver's license.

The survey also listed a position as a lab technician with GA Bureau of Investigation. (EX O at 52). This position requires the employee to perform a variety of lab operations, quality control activities, evidence controls and administrative support functions to facilitate the analysis of evidence in criminal cases. The annual salary for this job is listed as $23,613.60.

Claimant was also found suitable for a customer service representative position with Savannah Candy Kitchen Mail Order. (EX O at 52). This position was only seasonable and paid $8.00 an hour. The requirements for the employee are basic phone skills, strong interpersonal skills and minimal typing. Similar positions as a communications specialist with Savannah Chatham Metropolitan Police Department (SCMPD) and a data entry clerk with Temporaries Unlimited, Inc. were also listed. (EX O at 52-53). These jobs require good communication and typing skills and either had an annual salary of $25,000 listed or varied their salary.

The survey also listed a couple positions as a security officer for Security Experts, Inc. (EX O at 53). The duties for these positions included monitoring the site by patrolling or watching surveillance monitors and assisting the general public. The wage was listed as $6.00 to $6.50 an hour.

Lastly, the survey listed several positions with the title "sales person" or "customer service representative." (EX O at 54-55). The service agent position with Dollar Rent-A-Car had the duties of vacuuming and cleaning cars, checking tire pressure and oil levels. The Sales Person position with Auto Depot only required the employee to have good people skills. A Customer Service Representative with Budget Rent-A-Car was responsible for answering phones and assisting customers. The retail positions with The Parts House, Brinks Home Security Dealer and Advantage Employment required the employee to provide customer service and stock merchandise. The wages for these positions ranged from $6.50 to $8.50, except the position with Brinks Home Security Dealer was commissioned based and the position with The Parts House did not list a wage. (EX O at 54-55).

Medical Records of Dr. Sam Murray

Dr. Murray evaluated Claimant on April 17, 2001 after Claimant sustained an injury to his left knee. (CX 1 at 1). His evaluation concluded that Claimant's x-rays did not show any fracture, but did denote degenerative changes. Due to Claimant's complainant of persistent pain, Dr. Murray ordered an MRI be taken. According to Dr. Murray's records, the MRI indicated a non-displaced, impacted fracture of the posterior

medial tibial plateau, with no evidence of a meniscal injury. (CX 1 at 3). After physical therapy, Dr. Murray found Claimant had healed and he let him return to work on June 21, 2001. (CX 1 at 4).

Claimant later twisted his knee while stumbling and returned to Dr. Murray on April 9, 2002. After conducting a physical examination, Dr. Murray felt there may be a possible meniscus injury, so he advised Claimant to not squat, kneel or climb. (CX 2 at 1). An MRI was then completed on April 24, 2002. Upon reviewing the MRI, Dr. Murray found Claimant was at risk of his knee giving way, and again recommended that Claimant not do any kind of climbing, squatting, kneeling, prolonged walking or standing. He also advised that Claimant will eventually need to have the knee joint replaced. (CX 2 at 3). On June 13, 2002, Claimant informed Dr. Murray that his knee kept buckling, so he needed a cane to get around.

On September 10, 2002, Dr. Murray examined Claimant after Dr. Holtzclaw had given him a total knee replacement. Dr. Murray diagnosed Claimant has having end age degenerative osteoarthritis in his left knee and a permanent disability. (CX 3 at 7). In conclusion, Dr. Murray found Claimant to be totally and permanently disabled. (CX 3 at 7).

Deposition and Medical Records of Dr. James F. Holtzclaw

Dr. Holtzclaw is a board certified orthopedic surgeon. (EX M at 5). Half of Dr. Holtzclaw's practice is devoted to surgery, including surgery of the knees. (EX M at 5). Dr. Holtzclaw examined Claimant on June 18, 2002 at the request of Dr. Murray. (CX 3 at 1). On September 3, 2002 Dr. Holtzclaw performed a total knee replacement on Claimant. On April 28, 2003 Dr. Holtzclaw issued a report stating Claimant's left knee was permanently disabled. (CX 3 at 11). He assigned Claimant with a 37% impairment to the left lower extremity which translated to a 15% impairment to the whole person. (CX 3 at 11; EX B at 138). According to Dr. Holtzclaw, maximum medical improvement (MMI) was reached on April 14, 2003. (CX 3 at 11; EX B at 138).

While under the care of Dr. Holtzclaw, Claimant was referred to Antonio Cofer for a functional capacity evaluation. (EX B at 139-143). Based on the tests conducted, Claimant's physical demand was classified as medium. His range of motion in his left knee was also within normal limits, as was his mobility in the lumbar spine. (EX B at 141). In conclusion, Mr. Cofer found Claimant could functionally perform the essential duties required of a line hauler/ lineman. (EX B at 142).

On May 28, 2003, Claimant returned to Dr. Holtzclaw because he was still having occasional pain in his right knee. (CX 3 at 6). According to his assessment, Dr. Holtzclaw felt Claimant could not kneel or run and would not be safe working at heights on ladders. (CX 3 at 6; EX M at 26). Dr. Holtzclaw concluded that by union standards Claimant would be considered permanently disabled since he cannot carry out every single task, however, he believed Claimant would not be considered permanently disabled by any other standard. (CX 3 at 6; EX B at 150). During his deposition, Dr.

Holtzclaw did affirm that due to Claimant's physical restrictions, Claimant could not complete all the tasks of a longshoreman. (EX M at 29).

On January 22, 2004 and March 8, 2004, Claimant returned to Dr. Holtzclaw complaining of pain and swelling in his left knee, and also pain in his right knee and lower back. (CX 3 at 8; EX B at 161, 164). Dr. Holtzclaw advised Claimant that if he wanted treatment for his back and right knee, he would have to place it under private insurance. Claimant returned to Dr. Holtzclaw on June 28, 2004 with new complaints of lower back and right knee pain. (CX 3 at 12; EX B at 165). Dr. Holtzclaw found tenderness in the paraspinal areas of the lumbar spine, and medial joint line tenderness in the right knee, a Grade I-II spondylolisisthesis at the L5-S1 area, and a moderate medial compartment joint space narrowing in the right knee. (CX 3 at 12; EX B at 165). Dr. Holtzclaw prescribed anti-inflammatory medication and routine check-ups.

Based on these examinations, Dr. Holtzclaw testified that he is of the opinion that Claimant's current right knee and lower back complaints are unrelated to anything dealing with the left knee, including the total left knee replacement surgery. (EX M at 17). He based this conclusion on Claimant's excellent outcome following the total knee surgery and Claimant's history of back and knee problems that predated his left knee injury. (EX M at 17). However, Dr. Holtzclaw did affirm that a person with a weakened knee may favor it, adding more stress to his other knee. (EX M at 20).

Medical Records of Dr. Benjamin L. Watson

Dr. Watson evaluated Claimant on November 11, 2002. Dr. Watson diagnosed Claimant with post total knee replacement on the left side due to end stage degenerative osteoarthritis. He concluded Claimant was totally and permanently disabled. (CX 9 at 2).

Deposition and Medical Records of Dr. Edward Allcock

Dr. Allcock is a licensed osteopath. (CX 11 at 6). He first saw Claimant on April 28, 2004 after Claimant was referred to him by Dr. Watson. (EX K at 18-20). Claimant was complaining of lower back pain, pain in his left knee and deformity of the right knee. (CX 11 at 10). At this time, Dr. Allcock opined that Claimant had lower back pain with degenerative changes of the lumbar spine and lower extremity pain, as well as total knee arthroplasty, varus deformity of the right knee and degenerative changes of the calcaneal valgus of the bilateral feet. (CX 9 at 9; EX K at 20). He placed Claimant on physical therapy and prescribed pain medication. (CX 9 at 9; EX K at 20). On May 17, 2004, Dr. Allcock issued a letter stating Claimant's injuries to his knees have aggravated the degenerative changes in his lower extremities, and probably aggravated his low back pain. (CX 9 at 11; EX K at 26). Dr. Allcock suggested Claimant restrict his bending, lifting, squatting, kneeling and lifting over twenty-five pounds.

During his deposition, Dr. Allcock affirmed that he was predominately treating Claimant for low back pain. He conducted a series of tests during his examination, but

did not discover an abnormal range of motion or tenderness in Claimant's spine. (CX 11 at 14-16). However, based on Claimant's complaint of back pain, Dr. Allcock diagnosed him with a lumbar problem. Dr. Allcock also noted there was lower extremity pain, which could have created a chronic biomechanical positioning where there is an imbalance in muscle groups creating pain. (CX 11 at 17). However, Dr. Allcock did confirm that this symptom is usually accompanied by muscle spasms, which Claimant did not have.

Dr. Allcock also found Claimant had tight heel cords and tight hamstrings. (CX 11 at 20). He opined that this could have occurred from a deconditioning process or relating to the changes he had in his heels, knees and back where his muscle groups tightened up from either disuse or chronic restricted range of motion from either pain or limited activity.

Based on his examinations of Claimant, Dr. Allcock concluded that he felt very strongly that Claimant's knee problems were a contributing factor in Claimant's back pain. (CX 11 at 28). However, he did affirm that his letter of May 10, 2004 only stated that Claimant's lower extremities "may be aggravating his low back pain." (CX 9 at 10; CX 11 at 29). Dr. Allcock also affirmed that he never made a determination as to whether Claimant could return to work or whether any of Claimant's injuries are related to his accident on April 7, 2002. (CX 11 at 30-31). However, Dr. Allcock did opine that Claimant can not do any jobs requiring running, jumping or climbing ladders. (CX 11 at 37).

IV. Discussion

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd v. Shipyards v. Donovan, 200 F.2d 741 (5th Cir. 1962); Banks v. Chicago Grain Trimeers Ass'n, Inc., 390 U.S. 459, 467 reh'g denied, 391 U.S. 928 (1968). It has been consistently held that the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. § 556(d). The APA specifies the proponent of the rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994) aff'g 990 F.2d 730 (3d Cir. 1993).

Causation

Section 20(a) of the Act provides a claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated or accelerated that condition. See U.S. Indus./Fed. Sheet Metal, Inc. v.

Director, OWCP, 455 U.S. 608, 614-15 (1982); Merrill v. Todd Pac. Shipyards Corp., 25 BRBS 140, 144 (1991); Gencarelle v. General Dynamics Corp., 22 BRBS 170, 174 (1989), aff'd 892 F.2d 173 (2d Cir. 1989). Claimant's creditable subjective complainants of symptoms and pain can be sufficient to establish the elements of physical harm. Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359 (5th Cir. 1982). However, as the Supreme Court has noted, "[t]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." U.S. Indus., 455 U.S. at 615.

Once the claimant has invoked the presumption, the burden of proof shifts to the employer to rebut it with substantial countervailing evidence. Merrill, 25 BRBS at 144. The Eleventh Circuit, which has jurisdiction in this case, has held that in order to rebut the § 20(a) presumption, the employer must "rule out" the possibility of causation. Brown v. Jacksonville Shipyard, Inc., 893 F.2d 294 (11th Cir. 1990). Substantial evidence is defined as such relevant evidence as a reasonable mind might accept to support a conclusion. Sprague v. Director, OWCP, 688 F.2d 862, 865 (1st Cir. 1982). If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. See Del Vecchio v. Bowers, 296 U.S. 280, 286 (1935).

In this case, I find Claimant has invoked the Section 20(a) presumption. It is undisputed that Claimant suffered an injury to his left knee on April 7, 2002. (JE 1). Claimant testified that due to this injury and the resulting instability in his legs, he shifted the majority of his weight to his right leg. The added weight eventually aggravated his right knee and caused pain, which is still present. (Tr. 37). Prior to April 7, 2002, Claimant had injured his right knee, but this injury had completely healed. He was able to return to work with no restrictions after receiving medical treatment. (Tr. 20). Claimant now argues that the 2002 injury to his left knee has aggravated his pre-existing injury to his right knee.

Claimant also testified that by January, 2004, he started to develop lower back pain. Due to the pain in his knees, Claimant had to alter his walk. This change in motion, according to Claimant, eventually aggravated his lower back. Dr. Allcock also opined that the pain in Claimant's knees was aggravating the degenerative changes in his lower extremities as well as his lower back. (CX 9 at 11; EX K at 26). When examining Claimant's lower back, Dr. Allcock determined that the pain was most likely the result of a biomechanical positioning. According to Dr. Allcock's deposition, Claimant was compensating for the pain in his knees, creating an imbalance in the muscle groups. (CX 11 at 17). Furthermore, Dr. Allcock found the muscles in Claimant's legs and back had tightened up from either disuse or chronic restricted range of motion from either pain or limited activity. This evidence is sufficient to invoke the Section 20(a) presumption that working conditions have caused harm to Claimant's right knee and back.

The burden then shifts to the employer to submit substantial countervailing evidence to rebut the presumption that the injury was caused by the claimant's

employment. Negative evidence alone may be utilized to rebut a Section 20(a) presumption if it is specific and comprehensive enough to sever the potential connection between the particular injury and a job-related accident. Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075 (D.C. Cir. 1976). Employer has submitted sufficient evidence to rebut the presumption.

Claimant's injury at work on April 7, 2002 was only to his left knee and not his right knee or back. Furthermore, it is undisputed that Claimant has a significant history of both right knee and lower back problems. Specifically, Claimant has hurt his back on numerous occasions that date back to February, 1983. (Tr. 43-48). He also has hurt his right knee several times since 1978. (Tr. 43-48). Employer asserts it is more likely that Claimant's condition is the result of these numerous injuries, rather than the injury to his left knee on April 7, 2002.

Employer also submits the opinion of Dr. Holtzclaw, a board certified orthopedic surgeon. Dr. Holtzclaw asserts that Claimant's current right knee and lower back complaints are unrelated to any problems with his left knee. (EX M at 17). He based this conclusion on his findings that Claimant had an excellent outcome from the total knee replacement surgery. (EX M at 17). Also, after reviewing Claimant's medical records he determined that Claimant's long history of back problems that pre-dated his left knee injury was a more reliable explanation for Claimant's current pain. Therefore, Employer has submitted sufficient evidence to rebut the presumption that Claimant's condition is related to a work-related injury.

Once the presumption is rebutted, the administrative law judge must weigh all the evidence and a render a decision supported by substantial evidence. Del Vecchio v. Bowers, 296 U.S. 280 (1935). The ultimate burden of proof then rests on the claimant under the Supreme Court's decision in Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994). In the instant case, Claimant must prove by a preponderance of evidence that the current condition of his right knee and lower back is causally relate to his employment with Employer.

Back

Claimant has testified that the added stress to his joints after his April 7, 2002 injury has led to a chronic problem with his back. Since this injury, Claimant has had pain in his left knee when he applies any pressure in such activities as walking or bending. Consequently, he has altered his walk and his balance in order to accommodate the pain. These problems have remained even after Claimant underwent total knee replacement surgery. In fact, Claimant testified that his back has worsened in the last couple years. Claimant does admit he suffered previous injuries to his back, however, he asserts that these injuries had completely healed prior to April 7, 2002. (Tr. 22-23). Claimant states he never missed any work with Employer because of any problems with his back. After all of his injuries prior to April 7, 2002, Claimant was able to return to work without any restrictions and no pain. (Tr. 20).

Claimant also provided medical evidence supporting his contention that the pain in his back is the result of his injury to his left leg. On May 17, 2004, Dr. Allcock issued a letter stating Claimant's injuries to his knees have aggravated his low back pain. (EX 9 at 11; EX K at 26). During his deposition, Dr. Allcock reaffirmed this opinion, stating that after examining Claimant and based on Claimant's complaints of pain, he determined that Claimant's back condition could be created by a chronic biomechanical positioning where there is an imbalance in muscle groups creating pain. (CX 11 at 17). He also found the muscles in Claimant's back were tight from either disuse or chronic restricted range of motion from either pain or limited activity.

Conversely, Employer argues the opinion of Dr. Holtzclaw is more credible than Dr. Allcock. Dr. Holtzclaw concluded Claimant's lower back complaints are unrelated to his knee problems. This conclusion is based on Dr. Holtzclaw's review of Claimant's medical records and assessment of Claimant's total knee replacement surgery. He found that there may have been a temporary exacerbation of Claimant's back symptoms while Claimant was recovering from knee surgery, however, Claimant had an excellent outcome from that surgery. (EX M at 17). Instead, Dr. Holtzclaw found it was more likely that Claimant's complaints of back pain are solely connected to the several injuries his back sustained prior to April 7, 2002.

I find that Dr. Holtzclaw's conclusions are more persuasive. Dr. Holtzclaw is a board-certified surgeon, who performed the surgery on Claimant's left knee. (EX M at 5). Based on his expertise as a orthopedic surgeon and his familiarity with the condition of Claimant's left knee both before and after surgery, Dr. Holtzclaw was able to assert the knee had healed and was not a contributing factor to any back pain Claimant may have.

Dr. Allcock, however, had a more limited review of Claimant's condition. While a licensed osteopath (CX 11 at 16), Dr. Allcock is not a surgeon and was not present before or during Claimant's surgery. In fact, Dr. Allcock did not see Claimant until April 28, 2004, a year after Dr. Holtzclaw performed surgery on Claimant's left knee. (EX K at 18-20). After examining Claimant's back, he did conclude that degenerative changes in his lower extremities may be aggravating his lower back. (CX 9 at 11; EX K at 26). However, not only could Dr. Allcock not be certain, but he admitted that when a patient's back pain is due to this type of lower extremity pain, that patient usually has muscle spasms. Therefore, Dr. Allcock asserted that lower extremity pain could create a chronic biomechanical positioning where there is an imbalance in muscle groups creating back pain (CX 11 at 17), however, Claimant does not have the symptoms usually accompanying this diagnosis.

Dr. Holtzclaw's opinion is also supported by other evidence proffered by Employer. Claimant's low back problems began in 1983 when he was injured in a work-related accident. (Tr. 43). After receiving medical attention, Claimant was able to return to work with some restrictions on his ability to lift. Claimant reinjured his back in 1987 and sought medical treatment through 1988. (Tr. 44). In 1991, Claimant experienced pain in the left lower quadrant of his back when lifting. (Tr. 45). The medical records of

this incident indicate that Claimant's posture was titled to the right side with right rotation, and he was walking with a cane. (EX C at 41-42). He sought treatment for this injury through 1992. This extensive history of back problems supports Dr. Holtzclaw's conclusion that any pain Claimant feels in his back is related to previous injuries to his back, rather than the injury to his left knee.

Claimant counters that the left knee injury has aggravated these previous injuries because it has caused Claimant to alter his movement, such as his stride when walking. Employer, however, has offered video surveillance of Claimant that demonstrates his mobility. The surveillance recorded by Mr. Daniels shows Claimant walking without a limp and having no difficulty getting in and out of vehicles. (EX P). His back does not appear to give Claimant any problems when bending or in such activities as raking leaves. (EX P). Mr. Daniels also testified that he videotaped Claimant for thirteen days through January, 2004 until March, 2004 and he did not notice any deterioration in Claimant's condition. (Tr. 80). This video surveillance supports Dr. Holtzclaw's conclusion that Claimant's left knee was not affecting his back.

Right Knee

Claimant also asserts that the April 7, 2002 injury to his left knee caused the pain in his right knee. Due to the pain in his left knee and the instability it caused, Claimant shifted the majority of his weight to his right leg. According to Claimant's testimony, this shift in weight aggravated previous injuries to his right knee. (Tr. 27). In order to cope with the pain in his knees, Claimant asserts he needs a cane to aid in walking. (Tr. 27). Claimant also argues that the medical records of Dr. Holtzclaw demonstrate that Claimant has complained of right knee pain since May 28, 2003 and the pain has continued. (CX 3 at 6).

The weight of the evidence, however, supports Employer's assertion and Dr. Holtzclaw's conclusion that any pain in Claimant's right knee is not related to the injury to his left knee. Dr. Holtzclaw examined Claimant's right knee on several occasions between May, 2003 and June, 2004. He found medial joint line tenderness, as well as medial compartment joint space narrowing in Claimant's right knee. (CX 3 at 12; EX B at 165). However, he determined that this condition and any pain Claimant felt in his right knee was unrelated to the left knee injury. (EX M at 17). While someone with a weakened knee may favor it and add more stress to the other knee, Dr. Holtzclaw concluded this was not the case with Claimant. (EX M at 20). According to his examinations, Dr. Holtzclaw found Claimant has made a complete recovery from the total knee replacement surgery to his left knee and would not need to add more stress to his right knee.

Dr. Holtzclaw determined that Claimant's current right knee problems were most likely due to Claimant's history of problems with his knee that pre-dated his April, 2002 injury. Claimant has injured his right knee on several occasions since 1978. Most significantly, in 1995 Claimant began complaining of right knee pain and was reviewed by Dr. Holtzclaw. (Tr. 45-46). Claimant underwent an MRI and physical therapy.

However, by February, 1996 Claimant's condition did not improve and he underwent an arthroscopy of his right knee. (EX D). A couple months later, Claimant continued complaining of pain and was diagnosed with varus deformity which could require tibial osteotomies in the future. (EX D). Claimant continued to receive treatment for pain in his right knee through 1997 and 1998.

Claimant argues all of these previous injuries had completely healed prior to April, 2002. However, the weight of the evidence does not support his assertion that his right knee is now injured from added stress caused by a weak left knee. Not only does Dr. Holtzclaw, who examined Claimant as early as 1995, conclude this is not the cause of his pain, but video surveillance demonstrates that Claimant does not currently have any balance problems or require a cane to walk. Mr. Daniels' testimony and the surveillance he conducted support Employer's argument that Claimant's left knee has completely healed and he does not favor it. (Tr. 74-80; EX P). Consequently, the weight of the evidence does not support the contention that Claimant is placing added stress on his right leg to compensate for a weaker left leg.

Therefore, I find the weight of the evidence does not demonstrate that Claimant's current lower back and right knee problems are related to his April 7, 2002 injury to his left knee. Employer has demonstrated by a preponderance of the evidence that these injuries are not causally related to Claimant's employment.

Nature and Extent

The Parties have agreed that Claimant injured his left knee on April 7, 2002 during the course of his employment with Employer. (JX 1). The Parties also agree that Claimant was paid temporary total disability benefits from April 22, 2002 until August 24, 2003. Having established a work-related injury, the burden rests with Claimant to prove the nature and extent of his disability, if any, from those injuries. See Trask v. Lockheed Shipbldg. Constr. Co., 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching MMI. James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989); Trask, 17 BRBS at 60. Any disability before reaching MMI would thus be temporary in nature. The date of MMI is a question of fact based upon the medical evidence of record. Ballestros v. Willamette W. Corp., 20 BRBS 184 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbldg. & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enter., Ltd., 14 BRBS 395 (1981).

The question of extent of disability is an economic as well as medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). Disability under the Act means an incapacity, as a result of an injury, to earn wages, which the employee was receiving at the time of the injury at the same or any other employment. 33 U.S.C. § 902(10). In order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110

(1991). Economic disability includes both current economic harm and the potential economic harm resulting from the potential result of a present injury on market opportunities in the future. Metropolitan Stevedore Co. v. Rambo (Rambo II), 521 U.S. 121 (1997). A claimant will be found to have either no loss of wage-earning capacity, no present loss but a reasonable expectation of future loss (de minimis), a total loss, or a partial loss.

A claimant who is unable to return to his former employment due to his work-related injury establishes a prima facie case of total disability. Elliot v. C & P Tel. Co., 16 BRBS 89, 92 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339, 342-43 (1988). The burden then shifts to the employer to show the existence of suitable alternative employment. Trans-State Dredging v. Benefits Review Bd., 731 F.2d 199, 200 (4th Cir. 1984); Rinaldi v. General Dynamics Corp., 25 BRBS 128, 131 (1991). A claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. Rinaldi, 25 BRBS 128. If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. Southern v. Farmer's Export Co., 17 BRBS 24 (1985).

The Parties stipulated Claimant reached MMI on April 14, 2003. (JX 1). Claimant was paid a total of $67,625.60 in temporary total disability benefits and $102,945.48 in permanent partial disability benefits. (JX 1). Claimant does not dispute that the injury to his left leg is a scheduled injury under Section 908(c)(2) of the Act and he was paid accordingly. However, Claimant does contend that he is now totally disabled.

According to Claimant's testimony, he is unable to return to his position with Employer or any other longshore jobs because of the physical activity required of those positions. (Tr. 35). To support this testimony, Claimant offered the medical opinion of Dr. Watson. Based on his examination of Claimant on November 11, 2002, Dr. Watson concluded Claimant was totally disabled. (CX 9 at 2). Based on this evidence, I find that Claimant has established a prima facie case of total disability.

The burden then shifts to Employer, to demonstrate suitable alternative employment. To meet this burden Employer offered the testimony and labor market survey of Mr. Yuhas. The labor market survey was originally completed on June 26, 2003 and updated on January 14, 2005. The survey identified numerous positions, including an unarmed security guard, security monitor, customer service representative and automobile salesperson. (Tr. 89-90). The pay range was identified as $6.50 an hour to $13.00 an hour, as well as some salesperson positions where salary ranged from $25,000 to $40,000 annually. (Tr. 92-93). The positions identified in the survey were approved by Dr. Holtzclaw originally on September 29, 2003 and again after the survey was updated. (EX M at 14-15; EX O at 49-55).

Listed first were several automobile salesperson positions. Potential employers here included Fairway Mazda, Lincoln and Mercury, Saturn of Savannah, Savannah Toyota, Vaden Hyundai and Volvo of Savannah. (EX O at 50-51). These positions were all paid based on commission and only required a high school diploma and a driver's license, both of which Claimant has. Furthermore, Claimant has experience with car sales and has a car dealer license. (Tr. 40). I find these positions are all suitable for Claimant.

Mr. Yuhas' survey also listed a position as a lab technician with GA Bureau of Investigation. (EX O at 52). The duties of this position include performing lab operations, quality control activities, evidence controls and administrative support functions to facilitate the analysis of evidence in criminal cases. The employer also reported it was willing to provide any necessary training for potential employees and the annual salary was listed as $23,613.60. With this ability to train Claimant, I find this position suitable alternative employment.

Another position listed as suitable for Claimant was a customer service representative with Savannah Candy Kitchen Mail Order. (EX O at 52). This position requires the employee to have basic phone skills, strong interpersonal skills and minimal typing skills. The position is only seasonable and pays $8.00 an hour. Similar positions were also found with Savannah Chatham Metropolitan Police Department (SCMPD), which paid $25,000 annually, and Temporaries Unlimited, Inc., which varied its salary. (EX O at 52-53). I find each of these positions are within Claimant's physical restrictions and each are suitable alternative employment for Claimant.

Claimant is also able to perform the duties of an unarmed security officer. The survey found this position open with Security Experts, Inc. (EX O at 53). This employer required the officer to patrol the property, watch surveillance monitors and assist the general public. This position paid $6.00 to $6.50 an hour. I find this position to be suitable alternative employment.

Lastly, Mr. Yuhas listed positions identified as "sales person" or "customer service representative." (EX O at 54-55). The service agent position with Dollar Rent-A-Car had the duties of vacuuming and cleaning cars, checking tire pressure and oil levels. A similar position with Auto Depot required the employee to have good people skills. Also, Budget Rent-A-Car's customer representative is responsible for answering phones and assisting customers. The positions with the above car rental companies had a salary that ranged from $6.50 to $8.50 an hour. Moreover, Mr. Yuhas found a couple retail positions with The Parts House and Brink Home Security Dealer and Advantage Employment. Each of these employers required the retail personnel to provide customer service as well as stock merchandise. The salary for these positions was mostly commissioned based. Dr. Holtzclaw found each position to be within Claimant's physical restrictions. I find each position to be suitable alternative employment.

The conclusions in the survey are also supported by the functional capacity evaluation conducted by Antonio Cofer. (EX B at 141). Accordingly to the evaluation, Claimant's range of motion in his left knee was within normal limits, as was his mobility in the lumbar spine. (EX B at 141). Based on this evaluation, Mr. Cofer concluded Claimant could even functionally perform the essential duties required of a line hauler/lineman.

The survey demonstrates that a range of jobs existed in the Hampton Roads area, which were reasonably available, and which Claimant could have realistically secured and performed. See Lentz v. Cottman Co., 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988). The conclusions drawn by Mr. Yuhas and his staff in the survey are creditable, as they have demonstrated that they were aware of Claimant's age, education, work experience and physical limitations when he explored the local opportunities. See Southern v. Farmers Export Co., 17 BRBS 64, 66-67 (1985). Therefore, I find that suitable alternative employment existed as of June 26, 2003.

Claimant may nevertheless prevail in his quest to establish total disability if he demonstrates that he tried diligently and was unable to secure employment. Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988). The claimant must establish a reasonable diligence in attempting to secure some type of suitable employment within the compass of opportunities shown by the employer to be reasonably attainable and available and must establish a willingness to work. Turner, 661 F.2d at 1043. In this case, Claimant has failed to demonstrate that he performed a diligent job search. Claimant testified that he considers himself retired from longshore work. (Tr. 70). Furthermore, Mr. Yuhas testified that he is not aware of Claimant contacting any of the potential employers mentioned in the surveys. (Tr. 94).

Choice of Physician

Section 7(c)(2) of the Act provides that when the employer or carrier learns of an employee's injury, either through written notice or as otherwise provided by the Act, it must authorize medical treatment by the employee's chosen physician. Once a claimant has made his initial free choice of a physician, he may change physicians only upon obtaining prior written approval of the employer, carrier or deputy commissioner. See 33 U.S.C. § 907(c)(2); 20 C.F.R. § 702.406.

The employer is ordinarily not responsible for the payment of medical benefits if a claimant fails to obtain the required authorization. Slattery Assocs.v. Lloyd, 725 F.2d 780, 787, 16 BRBS 44, 53 (CRT) (D.C. Cir. 1984); Swain v. Bath Iron Works Corp., 14 BRBS 657, 664 (1982). Failure to obtain authorization for a change can be excused, however, where the claimant has been effectively refused further medical treatment. Lloyd, 725 F.2d at 787, 16 BRBS at 53 (CRT); Swain, 14 BRBS at 664.

Consent to change physicians shall be given when the employee's initial free choice was not of a specialist whose services are necessary for, and appropriate to, proper care and treatment. Consent may be given in other cases upon a showing of

good cause for change. Lloyd, 725 F.2d at 780, 16 BRBS at 53 (CRT); Maguire v. Todd Pac. Shipyards Corp., 25 BRBS 299, 301-02 (1992); Swain, 14 BRBS 657 (1982).

In this case, Claimant seeks a change in physician, arguing that he was never given the opportunity to choose a doctor and he never officially chose Dr. Holtzclaw as his treating physician. This Court has found Claimant did not demonstrate that the current injuries to his right knee and back were caused by a work-related accident. Consequently, Employer is not liable for medical expenses expended by Claimant in regards to these injuries. Concerning the left knee, Claimant has indicated there is no issue regarding medical care.[1] However, even if this issue was before the Court, Claimant has made his choice of physician. I find Claimant implicitly chose Dr. Holtzclaw as his treating physician by continuing to treat with him throughout the course of his surgical and rehabilitative treatment. Claimant has consistently met with Dr. Holtzclaw, a board certified orthopedic surgeon (EX M at 5), since June 18, 2002. (CX 3 at 1). Furthermore, Dr. Holtzclaw performed a total knee replacement surgery on Claimant's left knee. Dr. Holtzclaw's medical records show that since this operation, Claimant has continued to see Dr. Holtzclaw after the operation for routine check-ups and to fill prescription anti-inflammatory medication. (CX 3; EX B).

Since Claimant's left knee required surgery, and Dr. Holtzclaw is a board certified orthopedic surgeon, Claimant was never denied the choice of a specialist whose services were necessary and proper for care and treatment of his injury. Consequently, Employer is not required to give its consent to a change in physician after Claimant has continued to treat with Dr. Holtzclaw for several months. Also, Claimant has not produced any evidence tending to show good cause for a change in physician. Therefore, Claimant's request for a change in physician is hereby denied.

Conclusion

Based on the foregoing findings of fact, conclusions of law and the entire record, I hereby enter the following compensation order. All other issues not decided herein were rendered moot by the above findings.

ORDER

It is herby ORDERED, JUDGED AND DECREED that:

1. Claimant's request for benefits concerning his right knee and back is hereby DENIED.

2. Claimant's request for further compensation benefits concerning his left knee is hereby DENIED.

[1] During the hearing, Claimant's counsel advised this Court that no findings were necessary regarding the left knee injury. Counsel specifically stated there is "no problem as far as medical care." (Tr. 5).

3. Claimant's request to change the treating physician under § 7 of the Act is hereby DENIED.

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LARRY W. PRICE
Administrative Law Judge

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